UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
SEVENTH REGION

ST. JOSEPH'S HEALTHCARE CENTER

Employer/Petitioner

and **Case 7-UC-586**

LOCAL 79, SERVICE EMPLOYEES INTERNATIONAL UNION, AFL-CIO

Union

APPEARANCES:

Grant T. Pecor, Attorney, of Grand Rapids, Michigan, for the Employer/Petitioner.
Eric L. Frankie, Attorney, of Detroit, Michigan, for the Union.

DECISION AND ORDER

Upon a petition duly filed under Section 9(b) of the National Labor Relations Act, a hearing was held before a hearing officer of the National Labor Relations Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record[1] in this proceeding, the undersigned finds:

1. The hearing officer's rulings are free from prejudicial error and are hereby affirmed.

2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein.

[1] Both parties filed briefs, which were carefully considered.

3. The labor organization involved claims to represent certain employees of the Employer.

Bargaining and Procedural History

St. Joseph's Healthcare Center ("Employer") is a for-profit residential nursing home consisting of a single 169-bed facility in Hamtramck, Michigan. Colonial Health Care Center, LLC ("Colonial") purchased the facility on April 1, 2004 from Trinity Continuing Care Services ("Trinity") and, as a successor employer, recognized the Union as the collective-bargaining representative of two units of employees. One, a service and maintenance unit, consists of nurse aides, orderlies, housekeeping employees, cooks, dietary aides, maintenance employees and helpers, laundry employees, ward clerks, restorative technicians, data entry clerks, and staffing coordinators. The present size of this unit was not disclosed; the record suggests there are at least 80 nurse aides. The second bargaining unit, described in a 1996 Decision and Direction of Election (DDE) in Case 7-RC-20808 as "all full-time and regular part-time licensed practical nurses ["LPNs"], including charge nurses and Medicare nurses," is currently comprised of seven individuals denominated as staff nurses, all of whom are LPNs.[2]

Concomitant with the April 1, 2004 purchase, the Employer set new initial terms and conditions of employment for its unionized employees and began bargaining with the Union for new collective-bargaining agreements.[3] To date, no agreement has been reached with respect to either bargaining unit. As far as the record reveals, the terms and conditions of the service and maintenance unit are the initial terms set by the Employer about April 1, 2004.

The Employer began negotiations with the Union regarding the LPN unit despite its professed belief that the staff nurses it hired from the predecessor were statutory supervisors. After several months of bargaining, the Employer's counsel advised the Union in writing on January 27, 2005 that the Employer was withdrawing its current contract proposals for what counsel termed the "non-supervisory group" of LPNs represented by the Union, eliminating "all non-supervisory LPN positions" effective March 1, 2005, and urging all of the "non-supervisory LPN personnel to consider applying for a position as a supervisory LPN" with the Employer. In early February 2005, each bargaining unit LPN received a letter from Director of Nursing ("DON") Sharon O'Rear confirming that "all non-supervisory positions…will be eliminated on March 1, 2005" and

[2] The Employer has never employed a nurse in what came to be known contractually as the "medicare coordinator" position.

[3] The Union filed a charge in Case 7-CA-47388, challenging the Employer's right to set new initial terms and conditions of employment. The charge was dismissed on June 29, 2004.

encouraging the recipient to "apply for supervisory LPN positions" by February 17.

The Union filed an unfair labor practice charge in Case 7-CA-48355 on February 17, alleging that the Employer unlawfully removed "the LPN employees from the bargaining unit without agreement of unit clarification from the Board." On February 24, the Employer filed the instant unit clarification petition, seeking the exclusion of all full-time and regular part-time LPNs and medicare coordinators from the unit as supervisors.[4] On February 28, I advised the parties that Case 7-CA-48355 will be held in abeyance pending resolution of this unit clarification petition.

All of the seven bargaining unit LPNs successfully applied for the "supervisory" positions and, as of March 1, 2005, were reclassified as unit managers. On that same date, DON O'Rear met with several of them and handed out new job descriptions, the details of which are discussed more fully below.

The Employer asserts that the seven bargaining unit LPNs were statutory supervisors from the time it purchased the facility on April 1, 2004. Alternatively, the Employer urges that it invested them with additional authority on March 1, 2005 sufficient to render them supervisors. The Union opposes both views. I conclude, for the reasons set forth below, that the LPNs were statutory employees prior to March 1, 2005, and remained employees thereafter.

Overview of Operations

The Employer provides around-the-clock long-term skilled and basic nursing care. Residents are arranged in four wings or clinical care units, with units B and D having roughly twice the capacity of, and more nursing staff than, units A and C. The facility is run, and its 170 employees are supervised, by Administrator Henry Conerway, Jr. All department heads report to Conerway. The largest department is nursing, whose 120 employees are headed by DON Sharon O'Rear. Under DON O'Rear, in descending hierarchical order, are an assistant director of nursing (currently vacant), 3 clinical care coordinators, and 33 unit managers, who are non-bargaining unit nurses[5]. The seven unionized LPNs, who for many years

[4] Although the Employer's petition explicitly seeks the exclusion of medicare coordinators as well as LPNs, its brief states that because there are no incumbent medicare coordinators, it does not claim they are supervisors. (Brief, p. 2, fn. 2)

[5] The clinical care coordinators are Kathy Riley, Michelle Swinton, and Betty Contek. One of the non-unit nurse unit managers is Elizabeth Gonzalez; the others were not named.

have been called staff nurses, are neither clearly equal nor subservient to the unit managers in the Employer's chain of command.[6]

The parties stipulated, and I find, that the administrator, DON, assistant DON, and clinical care coordinators are statutory supervisors, by virtue of their authority to engage in one or more of the supervisory indicia set forth in Section 2(11) of the Act. The parties further stipulated, and I find, that the Employer's department heads are supervisors based on their authority to discharge employees.[7] Neither party currently disputes the 1996 DDE finding in Case 7-RC-20808 that the unit managers are supervisors as well.[8]

Employees are assigned to one of three eight-hour shifts. The administrator, DON, and other acknowledged supervisors generally work between the hours of 7:00 a.m. and 5:00 p.m. on weekdays, and are therefore physically present most of the day, and a small part of the afternoon, shift. The DON and an on-call staff of at least one clinical care coordinator are available at night and on weekends.

On the day and afternoon shifts, clinical units A and C are each assigned one nurse, either a unit manager or staff nurse. Units A and C on midnights share a single nurse, either a unit manager or staff nurse. Units B and D have two nurses apiece, either unit managers or staff nurses, on both days and afternoons, and one nurse per unit, either a unit manager or staff nurse, on midnights. The number of nurse aides per clinical unit varies from one to five, depending upon the unit and time of day. The average working ratio of nurses to aides is one to two and one-half.

Staff Nurse Authority Before March 1, 2005

Conceding that staff nurses do not possess all of the primary indicia of supervisory authority outlined in Section 2(11) of the Act, the Employer contends that they nonetheless have the authority to make decisions, or effective

[6] Although the Employer now calls them "unit managers," the seven LPNs at issue will be referred to as staff nurses or LPNs so as to distinguish them from the non-bargaining unit nurse unit managers. The staff nurses are Joann Thompson, Teresa Wilson, Dorothy Hawkins, Brenda Biggins, Arlene Chambers, Leslie Holland, and Patricia Byers. For ease of reference, the 33 non-bargaining unit nurse unit managers, comprised of RNs and LPNs, will be called unit managers.

[7] The department heads include Marketing Director Susan Alston, Housekeeping Director Carlos Hints, Dietary Director Simone Thomson, Maintenance Supervisor Mario Malone, Maintenance Assistant Supervisor Alonzo Lawson, Admissions Director Erin Kelly, Activities Director Esther Albrect, Social Services Director Linda Turner, and Registered Dietician Rebecca Ingram.

[8] The conclusion in 1996 as to unit managers was based solely on their authority independently to evaluate the work of LPNs and thereby to influence their merit pay increases. While the facility employed only 5 unit managers in 1996, their number has now swelled to 33.

recommendations, regarding assignments, direction, discipline, transfers, adjustment of grievances, and evaluations of employees. Administrator Conerway implied conclusionarily that staff nurses take those actions in respect to ward clerks and central supply personnel, as well as nurse aides. However, he admitted that central supply employees report directly to clinical care coordinators rather than staff nurses. Neither he nor anyone else gave specific evidence about interactions between ward clerks and staff nurses. There is evidence that staff nurses occasionally interact with other non-nursing personnel, by, for example, informing a dietary employee to bring a food tray, or a housekeeping and laundry employee to bring fresh linen. However, no light was shed on the ambit of the staff nurse's authority to compel performance by non-nursing workers. Virtually all of the evidence focused on staff nurses' oversight of nurse aides.

Responsible Direction; Room and Task Assignments

Staff nurses spend an undisclosed, but significant portion of their shift engaged in actual nursing duties. They consult with the departing nurse for updates on residents' conditions; make rounds of the residents; pass medications; perform treatments; monitor intravenous lines; and document events, procedures, and health conditions of the residents.

On each shift, residents' rooms are assigned to the nurse aides scheduled to work on that clinical unit. The Employer offered testimony that staff nurses assign the rooms, and the administrator implied that they may theoretically take the skills of nurse aides into account in making the assignments. No corroborative evidence or example of the rendering of such judgments was cited. To the contrary, it appears that staff nurses have little if anything to do with either apportioning their unit into groups of rooms or assigning rooms to nurse aides. A daily assignment sheet prepared not by the staff nurse but by someone else, unidentified in the record, pre-splits the unit into groups of rooms corresponding to the number of aides working. Testimony from both staff nurses and DON O'Rear shows that nurse aides claim their own room assignments, either keeping the same set every day or rotating sets. There is no evidence that staff nurses have ever countermanded the nurse aides' room self-assignments. As far as the record reveals, staff nurses simply acquiesce in the nurse aides' decisions.

The daily assignment sheet, an exemplar of which was not introduced, also lists the discrete tasks to be performed on each resident, e.g., bathe, feed, take to clinic. The actions may vary if the resident's medical condition changes or the resident's family makes a special request, such as to take the resident to a hairdressing salon. As noted, the staff nurse does not generate the daily assignment sheet or have input into the tasks it lists. The Employer offered

testimony that staff nurses are responsible for matching nurse aides to the listed tasks. It appears, however, that nurse aides routinely take the tasks associated with their given group of residents, and that nurse aides usually write their own names next to those tasks on the assignment sheet. No evidence was adduced of an occasion when a staff nurse modified the task sets, or reallocated a task from the aide assigned to that room to another aide perceived as more capable.

The Employer's witnesses suggested that a staff nurse could reprioritize a nurse aide's tasks in response to an exigency, such as a tornado or a resident's cardiac arrest. No examples were furnished of whether or when such events occurred, or how they affected task prioritizing.

Shift and Unit Assignments; Transfers

Nurse aides receive their shifts and clinical unit assignments from an individual called the staffing coordinator, to whom they also submit requests for shift and scheduling changes. The record contains no stipulations regarding the status or unit placement of the staffing coordinator. In the 1996 DDE in Case 7-RC-20809, the staffing coordinator was held to be a non-supervisory position in the service and maintenance unit. As far as the record shows, staff nurses have no input into the identity or scheduling of the nurse aides working with them.

Short-staffing of nurse aides due to unanticipated absences is handled in two ways. One is to summon supplemental staff by telephoning non-scheduled employees. On the day shift, the staffing coordinator makes the calls. According to the Employer, staff nurses make the calls on afternoons and midnights, without benefit of a written guideline as to whom to select. However, the Employer did not adduce specific evidence of this happening, nor did the Employer suggest what if anything the staff nurse is empowered to do if the contacted employee declines to work. The Union, which presented two staff nurses as witnesses, furnished evidence that short-staffing problems are handled on the afternoon and midnight shifts by either the staffing coordinator or a designated unit manager.

The second method to resolve short-staffing is to "pull" an aide from one clinical unit to another. Union witnesses testified that this is done on weekdays by the staffing coordinator or a clinical care coordinator, and on weekends by an on-call supervisor contacted at home. Employer witnesses testified in a general way that staff nurses may pull aides, but did not provide evidence of the procedures or protocols followed, nor explain how a conflict between the borrower and donor nurse would be resolved. There is evidence that on one occasion, a staff nurse asked a unit manager to loan her a nurse aide, and the unit manager ignored the

request until DON O'Rear intervened and ordered that an aide be pulled to the staff nurse's unit.

Staff nurses have no authority to cut expenses by sending employees home when the patient census is low. As for overtime, they may sign a document verifying that it was performed, but the decision to incur the cost of overtime is made by either upper management or, in some cases, a unit manager. No verification slips, approvals, or other overtime paperwork was proffered.

Around October or November 2004, DON O'Rear admonished staff nurse Dorothy Hawkins for trying to correct an undisclosed staffing problem, telling Hawkins to leave staffing to management and reminding her that she was not management.

Discipline

Staff nurses make rounds to observe nurse aides' work. If a staff nurse sees misconduct or faulty job performance, she is encouraged to give correction and counseling, and to document the problem by writing an incident report. No statistics were supplied as to how often, if ever, an incident report or counseling by a staff nurse triggers the issuance of discipline.

Any recorded observation by a staff nurse is subjected to independent investigation by a clinical care coordinator and/or the DON to assure its factual accuracy. In fact, DON O'Rear testified that any potential disciplinary action is investigated by upper management, even if the lower manager has the authority to issue the discipline on her own.

The Employer asserts that staff nurses had the authority prior to March 1, 2005 to issue discipline on their own, but agrees that the authority was almost never exercised. No disciplines have been meted out by staff nurses since the Employer purchased the facility on April 1, 2004. Before that date, only one discipline issued by a staff nurse was recalled by any of the witnesses, including Administrator Conerway, who has held his position since 1996. This single instance occurred around January or February 2004, when staff nurse Arlene Chambers reprimanded nurse aide Shantel Lust for failing to put a resident into bed as per Chambers' direction. The record does not illuminate whether Chambers initiated the idea of the discipline or was directed to issue the reprimand by upper management. Chambers, although still currently employed as a staff nurse, was not called as a witness, nor was the reprimand introduced. To explain why it did not introduce the document, the Employer noted that the discipline, along with all personnel material predating April 1, 2004, belongs to Trinity, the

predecessor owner of the facility. The Employer did not explain at the hearing or on brief why it did not subpoena such material.[9]

The Employer suggests that staff nurses have been instructed to discipline nurse aides. The evidence of this is a conversation that took place in summer 2004, when staff nurse Dorothy Hawkins complained to DON O'Rear about the quality of nurse aides, and O'Rear replied that Hawkins could "write them up." The record does not clarify whether O'Rear was thus encouraging the writing of incident reports or disciplinary recommendations. There is no evidence that any staff nurse has been disciplined for failure to discipline others.

The DON and administrator make all final disciplinary decisions based on the accuracy of the charge, the applicability of the invoked rule, and the appropriateness of the penalty. Either will reject discipline if the infraction is not substantiated or the sanction is not fair or reasonable. In regard to penalty, the Employer follows a progressive disciplinary system for its aides under which repeated offenses trigger increasingly serious sanctions. Because staff nurses do not have access to employee personnel files, they are not expected, or even able, to assess the proper degree of punishment under the progressive disciplinary system. At any rate, the record does not contain any evidence that a staff nurse has ever recommended discipline.

Evaluations

According to the Employer, even before March 1, 2005, staff nurses had "input" into evaluations of nurse aides. No witness testified to an example, and the record does not contain any completed evaluation, or even a blank exemplar, from which details of the form and content of a staff nurse's input might be inferred. A Union witness, a long-term staff nurse, testified that she has never had any involvement in evaluating nurse aides. In the 1996 DDE in Case 7-RC-20809, it was found that written appraisals played no role in pay increases or job status of nurse aides. Likewise, there is no evidence in this record that nurse aides' evaluations have any affect upon their tenure, compensation, promotion, or rewards.

[9] The 1996 DDE in Case 7-RC-20808 referred to two written warnings issued by LPNs, both in 1993. One was issued by the LPN at the specific instruction of her supervisory staff development coordinator, who co-signed the warning. The other was a written memorialization of a verbal warning as to which the record in Case 7-RC-20808 contained no details.

Other Factors

Among the initial terms of employment that the Employer set on April 1, 2004 was a three-step grievance procedure, allowing meetings, seriatim, with the grievant's supervisor, department head, and administrator. There is no evidence that any staff nurse has participated in the procedure as an employee's step-one supervisor. Neither staff nurses nor unit managers participated as management delegates in the contractual grievance procedure for nurse aides that bound the Union and the facility's predecessor owner, Trinity.

Staff nurses have no role in interviewing candidates for hire or making hiring decisions. Although they may casually request that a friend or colleague receive consideration, staff nurses are not asked for, and do not offer, formal hiring recommendations.

Discharge decisions are the province of the administrator and DON. Staff nurses are limited to making factual reports that are subject to additional scrutiny and investigation by the clinical care coordinator. Administrator Conerway testified that staff nurses may "recommend" termination, but was not asked to clarify what he meant. No instance of such a recommendation was adduced. DON O'Rear testified that staff nurses do not recommend discharge.

Staff nurses do not play a part in deciding whether a layoff or recall will occur, nor in determining who will be laid off or recalled.

Administrator Conerway testified that a staff nurse may direct an employee to leave the building, pending further investigation by higher level management, in the event of repeated insubordination or suspected patient abuse or peril. No witness cited any examples of this occurring.

The job description used by the Employer for staff nurses prior to March 1, 2005 was originally prepared by Trinity. On its face, it invested LPNs with the authority, inter alia, to participate in evaluations and make recommendations; determine staffing requirements; recommend dismissals and transfers; participate in hiring interviews and make selections; develop work assignments; review complaints and grievances; assure that discipline is fair and unbiased; and help implement and maintain an orientation program.

The administrator, department managers, DON, and clinical care coordinators meet every morning to discuss the events of the day. Neither staff nurses nor unit managers attend. There is no evidence that staff nurses are included in any other management meetings.

Staff Nurse Authority Since March 1, 2005

Effective March 1, 2005, the seven staff nurses have been called unit managers. Administrator Conerway testified that the change was primarily one of title and that staff nurses' fundamental responsibilities remain the same. According to testimony of DON O'Rear, the principal changes in duties are that staff nurses will now "participate" and be "more active" in the yearly preparation of evaluations of nurse aides, and will supply more "fine-tuned" supervision. The meaning of O'Rear's phrases was not further explored. Because no evaluation of a nurse aide has fallen due since March 1, there are no examples of staff nurses' participation in that process. Neither were any illustrations of more "finely-tuned supervision" supplied.

On March 1, the Employer issued a new written job description for the 33 unit managers and 7 staff nurses who just joined their ranks. DON O'Rear helped prepare the document. The listed duties include: submit disciplinary reports regarding any observations of misconduct by nurse aide staff and/or other employees; review the number and level of persons on duty, making appropriate staffing adjustments; coordinate with a nurse manager to call staff to come in or stay at home; assign patient care in accordance with patient needs and staff capability; coordinate a departmental time schedule, resolve staffing issues, predict shift and unit staffing needs, and recommend strategies to improve staffing; collaborate with directors on performance appraisals; provide coaching and direct assistance to co-workers and staff; orient and train new personnel; provide direction to nurse aide staff on aspects of patient care.

DON O'Rear distributed the new unit manager job descriptions at a meeting on March 1. The record contains evidence of only one meeting that day, attended by O'Rear, clinical care coordinator Cathy Riley, staff nurses Dorothy Hawkins, Joann Thompson, and Pat Byers, and unit manager Elizabeth Gonzalez. The record is silent on how, if at all, the new job descriptions were distributed to the other 36 unit managers, and whether O'Rear held similar meetings with them. According to O'Rear, she told those attending that they would now help evaluate nurse aides and should discipline aides as necessary. The Union's witnesses, both present at the meeting, recalled the remark about discipline but not evaluations.

The Employer introduced a three-page document that O'Rear testified accurately reflects what she said during the March 1 meeting. No evidence was elicited as to its provenance, purpose, author, or preparation date. It was introduced and admitted without any foundation as to O'Rear's need for memory refreshment. The exhibit expands upon O'Rear's relatively terse testimonial

account of her remarks at the meeting. Those details of the exhibit that are uncorroborated by any witness at the hearing include the following:

- This [filing a disciplinary report upon observing misconduct] will allow you to "effectively recommend" the discipline, and potentially the discharge, of less senior nursing staff. Along these same lines, we also want to know when individuals should be rewarded for going above and beyond the call of duty.

- You will have input in the decisions regarding whether or not new hires complete their probationary periods and/or whether probationary periods should be extended.

- You will also be consulted regarding annual evaluations and asked to give input with regard to where nurse aides need improvement and whether or not they should be retained.

- Unit Managers are also going to be directly involved in the evaluation of staffing needs…Likewise, you will also be asked to identify when individuals should be sent home. This is an especially important responsibility considering our recent funding cuts.

DON O'Rear testified that staff nurses will now be held accountable for the performance of nurse aides. As she explained at the hearing, and as set forth in the exhibit described above, accountability means that a staff nurse is subject to discipline for an error committed by an aide on her clinical unit. As confirmed in the above-noted exhibit, this dimension of accountability is technically not new, because nurse licensure holds nurses to such a standard. However, O'Rear testified that prior to March 1, staff nurses were only inconsistently held responsible for their nurse aides' work. The record does not reveal how staff nurses were held responsible on those sporadic pre-March 1 occasions, nor how they have been held responsible since then. When O'Rear was asked at the hearing whether the Employer was merely holding staff nurses to nursing standards existing prior to March 1, or whether the Employer was "adding some new responsibilities and job functions, to their positions," she replied, "I am not really sure."

Asked by Union counsel what circumstances led to the Employer's decision to eliminate the staff nurse position, Administrator Conerway answered as follows:

A There was not a reason to continue to have it.
Q And that was all?
A That was it.

The same question posed to DON O'Rear prompted the following exchange:

A God, you all have got me so confused right now.
Q If you know.
A I just know what I needed for that building. I can't answer. I guess I don't know.

Staff nurses were not granted any pay increases pursuant to their reclassification as unit managers. As of the hearing date, which was one month after March 1, the Employer had not yet provided any training on the duties outlined in the new job description. Staff nurses still do not attend daily "morning meetings" with managers. As far as the record reveals, they still have no access to employee personnel files.

Analysis

Timing of the Petition

The Union argued at the hearing, although not in its brief, that the petition is untimely because 1) the staff nurses have long been included in the bargaining unit with unchanged duties, and 2) the recent purportedly changed duties constitute unfair labor practices. The second prong may not be resolved or even addressed here. It is axiomatic that representation proceedings are neither intended nor permitted to explore unfair labor practice issues. ***Texas Meat Packers, Inc.***, 130 NLRB 279 (1961).

The Union's first rationale does not apply for two reasons. First, unless doing so will unduly disturb a bargaining relationship, the Board is compelled to exclude persons who meet the test of supervisors, managerial employees, or confidential employees, whether or not such individuals have long been included under previous contracts and their job duties remain the same. ***The Washington Post Co.***, 254 NLRB 168, 168-169 (1981). Second, unit clarification is not deemed to disturb a bargaining relationship unduly when it takes place during contractual hiatus or before a contract is consummated. See ***Edison Sault Electric Company***, 313 NLRB 753 (1994); ***Wallace-Murray Corp.***, 192 NLRB 1090 (1971). Here, the Employer filed the petition before the parties reached agreement on a labor contract.

The Employer's petition is timely.

Merits of the Petition

Section 2(3) of the Act excludes from the definition of the term "employee" "any individual employed as a supervisor." Section 2(11) of the Act defines a "supervisor" as:

> any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not merely of a routine or clerical nature, but requires the use of independent judgment.

Section 2(11) is to be interpreted in the disjunctive, so that the possession of any one of the enumerated authorities places the employee so invested in the supervisory class. ***Ohio Power Co. v. NLRB***, 176 F.2d 385, 387 (6th Cir. 1949), cert. denied 338 U.S. 899 (1949); ***Allen Services Co.***, 314 NLRB 1060, 1061 (1994).

However, if every minor order made its issuer a supervisor, our industrial culture would be predominantly supervisory. ***Providence Hospital***, 320 NLRB 717, 725 (1996), quoting ***NLRB v. Security Guard Service***, 384 F.2d 143, 151 (5th Cir. 1967). The Board and courts are mindful not to deprive employees of their rights under Section 7 by interpreting the term supervisor too broadly. ***Unifirst Corp.***, 335 NLRB 706, 712-713 (2001); ***Azusa Ranch Market***, 321 NLRB 811, 812 (1996); ***Williamson Piggly Wiggly v. NLRB***, 827 F.2d 1098, 1100 (6th Cir. 1987). Therefore, to separate straw bosses from true supervisors, the Act prescribes that the exercise of a supervisory indicium be in the interest of the employer and require the use of independent judgment. This means that neither the discharge of Section 2(11) functions in a routine or clerical manner, nor the use of independent judgment to solve problems unrelated to Section 2(11) functions, qualifies as supervisory. ***Alois Box Co.***, 326 NLRB 1177 (1998).

In ***NLRB v. Kentucky River Community Care***, 532 U.S. 706 (2001), the Supreme Court upheld the Board's longstanding rule that the burden of proving Section 2(11) supervisory status rests with the party asserting it. ***Elmhurst Extended Care Facilities, Inc.***, 329 NLRB 535, 536 fn. 8 (1999) (any lack of evidence in the record is construed against the party asserting supervisory status); ***Benchmark Mechanical Contractors, Inc.***, 327 NLRB 829 (1999); see ***The Ohio***

Masonic Home, Inc., 295 NLRB 390, 393 fn. 7 (1989); ***Bowne of Houston, Inc.***, 280 NLRB 1222, 1223 (1986). However, the Court rejected the Board's interpretation of the term "independent judgment" in Section 2(11) to exclude the exercise of "ordinary professional or technical judgment in directing less-skilled employees to deliver services in accordance with employer-specific demands." 532 U.S. at 707. Although the Court found the Board's interpretation of "independent judgment" in this respect to be inconsistent with the Act, it recognized that it is within the Board's discretion to determine, within reason, what scope or degree of "independent judgment" meets the statutory threshold. See ***Beverly Health & Rehabilitation Services***, 335 NLRB 635 fn. 3 (2001), enfd. in relevant part 317 F.3d 316 (D.C. Cir. 2003). Furthermore, the Court acknowledged that the term "independent judgment" is ambiguous as to the *degree* of discretion required to establish supervisory status and that such degree of judgment "that might ordinarily be required to conduct a particular task may be reduced below the statutory threshold by detailed orders and regulations issued by the employer." 532 U.S. at 713-714.

In discussing the tension in the Act between the Section 2(11) definition of supervisors and the Section 2(12) definition of professionals, the Court also left open the question of the interpretation of the Section 2(11) supervisory function of "responsible direction," noting the possibility of "distinguishing employees who direct the manner of others' performance of discrete tasks from employees who direct other employees." *Id.* at 720. See ***Majestic Star Casino***, 335 NLRB 407, 408 (2001). For instance, direction as to a specific and discrete task falls below the supervisory threshold if the use of independent judgment and discretion is circumscribed by the superior's standing orders and the employer's operating regulations, which require the individuals to contact a superior when problems or anything unusual occurs. ***Dynamic Science, Inc.***, 334 NLRB 391 (2001); ***Chevron Shipping Co.***, 317 NLRB 379, 381 (1995).

Staff Nurses' Status Prior To March 1, 2005

The Employer essentially concedes, and the record shows, that staff nurses have never possessed statutory supervisory authority in the areas of hiring, layoff, recall, promotion, or reward. However, the Employer urges that at all material times, they have had authority to responsibly direct employees, assign, transfer, discipline, suspend, effectively recommend discharge, and adjust employee grievances. On this record, I do not agree.

The case for responsible direction lies in the staff nurses' role in assigning the residents for whom nurse aides will provide care and which tasks aides will perform. Although it was contended in conclusionary terms that staff nurses may

take aides' skill and experience levels into account in deciding such matters, there is no evidence that they have done so. Consequently, the Employer's conclusionary testimony is entitled to little weight. ***Armstrong Machine Co.***, 343 NLRB No. 122, slip op. at 1, fns. 4 and 5 (Dec. 16, 2004); ***Dynamic Science, Inc.***, supra at 393. Rather, the record establishes that staff nurses merely ratify the task assignments that aides assume on their own, after the aides choose sets of rooms grouped by unidentified persons other than staff nurses. Although tasks to be performed for a given resident may vary day-to-day pursuant to medical needs or family requests, nothing in the record dispels the inference that variances fall within a set of normal, routine occurrences, such as bathing, feeding, ambulating, and transporting. The limited authority of nurses to modify tasks to less skilled employees based on standing medical orders or what is dictated by experience or routine protocol does not require the use of independent judgment in the direction of other employees. ***Northern Montana Health Care Center***, 324 NLRB 752, 753 (1997), enfd. in relevant part 178 F.3d 1089 (9th Cir. 1999); see ***Ferguson Electric Co.***, 335 NLRB 142, 147 (2001).

Another purported element of staff nurses' responsible direction is their role in checking and correcting aides' work. Generally, however, showing other employees the correct way to perform a task does not confer supervisory status. ***Franklin Home Health Agency***, 337 NLRB 826, 831 (2002). The nurses' oversight and teaching responsibilities are not clearly linked to any personnel authority in the primary statutory categories listed in Section 2(11). Staff nurses' oral or written counselings and coachings are unaccompanied by recommendations for further discipline. At most, staff nurses make factual reports, which they submit to the clinical care coordinator and ultimately the DON, each of whom undertakes an independent investigation and decides on that basis what level of discipline, if any, is warranted. I conclude that staff nurses' correction and counseling duties are merely reportorial and didactic functions exercised due to their greater skill and competence. This is not the predicate of supervisory authority. ***Northern Montana Health Care Center***, supra; ***Passavant Health Center***, 284 NLRB 887, 889 (1987); ***NLRB v. Attleboro Associates, Ltd.***, 176 F.3d 154, 174 (3rd Cir. 1999); ***NLRB v. Grancare, Inc.***, 170 F.3d 662, 668 (7th Cir. 1999); ***Waverly-Cedar Falls Health Care Center, Inc. v. NLRB***, 933 F.2d 626, 630 (8th Cir. 1991); ***NLRB v. City Yellow Cab Co.***, 344 F.2d 575, 580-581 (6th Cir. 1965).

Staff nurses have a negligible role in respect to scheduling. Shift and unit assignments are made by the staffing coordinator. Early release decisions are similarly outside the staff nurse's province. There is no evidence that a staff nurse may compel an employee to work overtime, and a decision to incur the expense is made only by upper management. The record does not reveal that staff nurses

have any part in scheduling breaks or deciding if an absence is excused. The evidence is unpersuasive that staff nurses have effective, final authority on their own to cause aides to be pulled from one unit to another. Even if they did, such transfer decisions require nothing more than routine judgments, based on Employer policy and government regulation as to the number of aides needed to serve a particular set of residents. This does not suffice to impart supervisory authority. ***Northern Montana Health Care Center***, supra at 754.

Staff nurses on the day shift do not make telephone calls to secure additional aides to cover unanticipated staffing shortages, and whether they do so on afternoons and midnights is contested. Even assuming some role for staff nurses in making off-shift calls, the record is barren of the critical evidence that staff nurses are empowered to mandate that aides come in from home or stay past their regular quitting time. Merely seeking voluntary replacements for absent employees does not constitute supervisory authority. ***Youville Health Care Center, Inc.,*** 326 NLRB 495, 496 (1998); ***Providence Alaska Medical Center v. NLRB***, 121 F.3d 548, 552-553 (9th Cir. 1997); ***Children's Habilitation Center, Inc. v. NLRB***, 887 F.2d 130, 134 (7th Cir. 1989).

Staff nurses have not made disciplinary recommendations. There is evidence in the last decade of only one written warning issued by a staff nurse, the genesis of which was not disclosed in sufficient detail to permit a conclusion that the staff nurse exercised independent judgment in issuing it. Rather, as noted above, staff nurses' responsibility in the area of discipline is to serve as a conduit by reporting misbehavior and preparing anecdotal memoranda. Higher management then independently investigates and determines penalties for misconduct. The Board does not find anecdotal reports or written warnings to be proof of supervisory authority unless they result in personnel action without independent investigation or review by others. ***Northcrest Nursing Home***, 313 NLRB 491, 497-498 (1993); ***Hillhaven Rehabilitation Center***, 325 NLRB 202, 203 (1997). The Board has repeatedly held, with court approval, that a reportorial function is not sufficient to support a supervisory finding. ***Ohio Masonic Home***, supra at 393-394; ***NLRB v. Grancare, Inc.***, supra; ***NLRB v. City Yellow Cab Co.***, supra.

Whatever authority a staff nurse possesses to eject an abusive or repeatedly insubordinate nurse aide from the facility is mandated by law or the Employer's clear policy. After the staff nurse has defused the situation, such incidents are subject to independent review and investigation by the clinical care coordinator and/or DON. The taking of limited action in response to flagrant violations is insufficient by itself to establish supervisory status. ***Vencor Hospital – Los Angeles***, 328 NLRB 1136, 1139 (1999); ***Phelps Community Medical Center***, 295

NLRB 486, 492 (1989); ***Loffland Bros. Co.***, 243 NLRB 74, 75 fn. 4 (1979); ***Waverly-Cedar Falls Health Care Center v. NLRB***, supra.

Staff nurses before March 1, 2005 had no responsibility for preparing evaluations for other employees. Although the Employer adduced testimonial evidence that they had "input" into evaluations of nurse aides, it neglected to adduce any evidence of the kind of "input" they rendered. Such conclusionary testimony may not relied upon to establish supervisory authority, especially when it is contested, as it was here by a long-term staff nurse who testified that she never played any role in evaluating anyone. ***Chevron Shipping Co.***, supra at 381 fn. 6; ***Sears, Roebuck & Co.***, 304 NLRB 193 (1991).

Even more significantly, there is no showing that evaluations of nurse aides have an affect upon the aides' job tenure or status. Because evaluating as such is not a statutory indicium of supervisory authority, the Board has consistently declined to find supervisory status based on evaluations, without evidence that they constitute effective recommendations to reward, promote, discipline, or likewise affect the evaluated employee's job status. ***Custom Mattress Mfg.***, 327 NLRB 111, 112 (1998); ***Ten Broeck Commons***, 320 NLRB 806, 813 (1996); ***Brown & Root, Inc.***, 314 NLRB 19, 21 (1994); ***New York University Medical Center v. NLRB***, 156 F.3d 405, 413 (2nd Cir. 1998); ***Lynwood Health Care Center, Minnesota, Inc. v. NLRB***, 148 F.3d 1042, 1046-1047 (8th Cir. 1998).

The record does not support the notion that staff nurses adjust employee grievances. That the Employer's grievance procedure names "supervisors" as the first-line management delegates to receive and resolve employee grievances does not make staff nurses statutory supervisors, without evidence, missing here, that staff nurses serve as such first-line delegates. Contrary to the Employer's suggestion, making sure that units are properly equipped with linen, food trays, and other supplies does not require staff nurses to use independent judgment to resolve employee grievances over terms and conditions of employment. Rather, these are routine efforts accomplished by requests or minor instructions and orders, actions that do not confer supervisory status. ***Franklin Home Health Agency***, supra at 830-831.

The staff nurse job description that the Employer inherited from Trinity and continued to utilize until March 1 purports to vest staff nurses with the authority to make recommendations with respect to evaluations, determine staffing requirements, recommend dismissals and transfers, and perform various other personnel functions. The record does not establish that the Employer ever informed staff nurses that it adopted Trinity's description of their duties, and the evidence flatly belies that staff nurses perform such functions for the Employer. I

conclude that the job description is a mere paper conveyance that does not impart actual supervisory authority. ***Valley Slurry Seal Co.***, 343 NLRB No. 34, slip op. at 14 (Sept. 30, 2004); ***Franklin Home Health Agency***, supra at 829; ***Crittenton Hospital***, 328 NLRB 879 (1999).

The final basis for inferring supervisory status urged by the Employer is that afternoon shift nurses working past 5:00 p.m., and midnight shift nurses for the whole of their shift, are the highest level nursing personnel on their respective units. However, this fact does not prove that staff nurses are ever alone in the building without an acknowledged supervisor also present, because staff nurses and unit managers are scheduled interchangeably. For all one is able to surmise from this record, at least one supervisory unit manager is always present among the 6 nurses and 14 aides on afternoons, and the 3 nurses and 8 aides on midnights.

Even if only staff nurses and no unit managers happen to be scheduled on a given afternoon or midnight shift, that does not imply that staff nurses must be supervisors. Nothing in the statutory definition of supervisor suggests that service as the highest-ranking worker on site requires a supervisory finding. ***Training School at Vineland***, 332 NLRB 1412, fn. 3 (2000)**.** This is perhaps especially true in nursing care settings. As the court observed in ***NLRB v. Hillview Health Care Center***, 705 F.2d 1461, 1467 (7th Cir. 1983):

> Although on the evening (3 p.m. to 11 p.m.) and night (11 p.m. to 7 a.m.) shifts the licensed practical nurses are the highest-ranking employees on the premises, this does not ipso factor make them supervisors. A night watchman is not a supervisor just because he is the only person on the premises at night, and if there were several watchmen it would not follow that at least one was a supervisor.

Nursing duties performed at night when most patients are sleeping do not necessarily demonstrate supervisory authority, because little personnel action occurs during off-shifts. ***Beverly Manor Convalescent Centers***, 275 NLRB 943, 947 (1985) ("Little happens at night in a care center setting; the staff performs a holding action…."); see also ***Children's Habilitation Center, Inc. v. NLRB***, 887 F.2d at 133 ("too facile a maneuver" to focus on nighttime ratio of supervisors to employees, because there is less need to supervise employees at night when residents are sleeping).

As far as the record discloses, staff nurses, even those on afternoons and midnights, have no authority outside their own clinical units. The DON and other stipulated supervisors above the level of unit managers share on-call duties at all times. The record does not set forth any concrete examples of exigent non-routine

circumstances occurring on off-shifts requiring staff nurses to make independent judgments about supervisory matters. Consequently, this factor alone is not dispositive of the staff nurses' status. ***Ken-Crest Services***, 335 NLRB 777, 779 fn. 16 (2001); ***Bozeman Deaconess Hospital***, 322 NLRB 1107, 1116 (1997); ***Washington Nursing Home, Inc.***, 321 NLRB 366, 372, 381 (1996); ***Northcrest Nursing Home***, supra at 499-500, 508; ***NLRB v. KDFW-TV, Inc.***, 790 F.2d 1273, 1279 (5th Cir. 1986); ***NLRB v. Heid***, 615 F.2d 962, 964 (2nd Cir. 1980); ***Oil, Chemical and Atomic Workers Int. Union v. NLRB***, 445 F.2d 237, 241-242 (D.C. Cir. 1971), cert. denied 404 U.S. 1039 (1972).

Finally, I note that if staff nurses were supervisors, over 37 percent of the Employer's nursing department staff of 120 employees would be supervisory.[10] This is an unusually top-heavy ratio, even given the Employer's unexplained nurse to aide ratio goal of one to two. ***Beverly California Corp. v. NLRB***, 970 F.2d 1548, 1555-1556 (6th Cir. 1992) (classifying 25% of nursing home staff as supervisors makes ranks of supervisors "pretty populous").

For the foregoing reasons, I find that prior to March 1, 2005, staff nurses were statutory employees.

Staff Nurses' Status Since March 1, 2005

The Employer contends that it invested staff nurses with enough additional authority effective March 1 that, regardless of their previous status, they are now statutory supervisors. If the Employer were correct, I would be constrained to defer a ruling on the unit clarification petition, because the changes at issue are alleged to have been made unilaterally and to be unfair labor practices. ***Texas Meat Packers***, supra; see ***Dickerson-Chapman, Inc.***, 313 NLRB 907, 909 (1994) (clarification petition raising issues in §8(a)(5) complaint is dismissed, subject to refiling if otherwise appropriate). Instead, I find the record inadequate to conclude that the staff nurses became supervisors effective March 1.

The facility's own administrator described the March 1 change as one of title, not fundamental responsibilities. Although the DON highlighted three supposedly augmented powers, none meets the Employer's burden.

First, according to the DON, she informed staff nurses and unit managers alike on March 1 that they will now complete evaluations for other employees.

[10] If the Employer prevails, 45 of its 120-person nursing department staff, or 37.5%, would be supervisors: DON, ADON, 3 clinical care coordinators, 33 non-bargaining unit supervisory unit managers, and the 7 staff nurses at issue. Finding staff nurses to be employees reduces the supervisory percentage to almost 32%, which is still notably high.

This testimony was disputed. The DON did not claim to have explained to the nurses how they would go about this task, and no evaluations have yet been submitted. The new job description states that nurses will collaborate with the DON on performance appraisals, but the record fails to suggest what degree of scrutiny and effect the DON will give the nurses' opinions. Most importantly, whatever direct role staff nurses will now play in preparing evaluations, the fact remains that, as far as this record shows, evaluations do not affect nurse aides' job tenure or status. Evaluations, therefore, may not be the predicate for a supervisory finding. ***Custom Mattress Mfg.***, supra.

Second, the DON's testimony that staff nurses will now provide more fine-tuned supervision was never defined, leaving the evidence ambiguous and inchoate. Even if staff nurses are now expected to issue more "writeups," there is no evidence that such documents will be different from the anecdotal or progress reports that staff nurses have always been encouraged to submit. I note in this connection that staff nurses still have no access to personnel files, have not been told to discipline aides on different forms or in different ways from before, and have not been trained on any new dimensions of their disciplinary role.

The Employer's revised March 1 job description is similar to the one it maintained prior to March 1. The DON professes, however, not only to have expounded upon such duties but to have expanded them, by allegedly informing nurses that they will now, for example, "effectively recommend" discipline, discharge, and reward. No witness corroborated the DON that she actually made the statements contained in the unauthenticated summary.

The assertedly enunciated authority has not been exercised to date. There is no evidence that staff nurses have yet made any recommendations regarding discipline, discharge, or reward. Nor, as noted, is it certain whether recommendations regarding discipline henceforth initiated by staff nurses will be subject, as before, to independent review by conceded supervisors. The Employer has not adduced sufficient evidence that staff nurses are now supervisors by virtue of their authority to discipline or effectively recommend discipline.

Third, the claim that staff nurses are now fully accountable for errors committed by others reflects licensing imperatives and applicable state and federal regulations. Accountability, however, is not necessarily accompanied by the investiture of statutory supervisory duties. ***Valley Slurry Seal Co.***, supra, slip op. at 15; ***Third Coast Emergency Physicians, P.A.***, 330 NLRB 756, 759 (2000) (accountability to follow hospital protocols, standing orders, and federal requirements is not per se supervisory). Significantly, when the DON was asked

whether holding nurses accountable entailed adding new responsibilities, she answered that she did not know.

I am mindful of the pronouncement by the Second Circuit in ***Schnurmacher Nursing Home v. NLRB***, 214 F.3d 260, 267 (2d Cir. 2000), that accountability for another's failure to perform a duty establishes, as a matter of law, supervisory power responsibly to direct. This broad doctrine has not been explicitly endorsed by the U. S. Supreme Court, another Circuit Court, or the Board.

Moreover, it appears that accountability must be established by objective evidence before the ***Schnurmacher*** principle applies. Not coincidently, the ***Schnurmacher*** record contained evidence that the nurses in question received discipline expressly keyed to the misconduct of others in their charge. Two years after the ***Schnurmacher*** decision, the absence of disciplinary warnings and evaluations expressly holding nurses accountable for the actions of subordinates prompted the Board to distinguish ***Schnurmacher*** and hold that the nurses at issue were not statutory supervisors. ***Franklin Home Health Agency***, supra at 831.

Although the Employer's staff nurses have always been theoretically responsible for the actions and omissions of their aides, the DON admitted that, prior to March 1, nurses were not necessarily disciplined for aides' faulty performance. The Employer allegedly hopes as of March 1 to bring more urgency and consistency to the notion of accountability. However, the record lacks evidence that any nurse has been disciplined under the accountability rubric, nor is there evidence as to how, if at all, evaluations of nurses will reflect this concept. The one post-March 1 discipline in the record faults a staff nurse for her direct dealings with a resident, not her vicarious responsibility for the actions or inactions of an aide. Because simply invoking the shibboleth of accountability has no presumptive impact under Section 2(11), and there is no evidence that the Employer's goal of accountability has been implemented since March 1 more meaningfully than before, the Employer has failed to meet its burden.

Finally, there is no evidence that staff nurses have received training or explanation as to their purported grant of authority in the revised March 1 job description in personnel areas such as staffing needs and transfers. The record contains no practical examples of the exercise of such authority since March 1. Putting aside the substantial question of what the DON told staff nurses on March 1, the mere articulation of untested authority in a new, ambiguous job description is an insubstantial basis on which to make a supervisory finding. ***Chevron U.S.A., Inc.***, 309 NLRB 59, 69 (1992) (no weight given to job description, where no independent evidence of possession or exercise of described authority). Without

more, I am unable to credit these alleged communications as conveyances of actual authority to make effective recommendations using independent judgment. ***Crittenton Hospital***, supra; ***East Village Nursing & Rehabilitation Center v. NLRB***, 165 F.3d 960, 962-963 (D.C. Cir. 1999).

Conclusion

For the reasons set forth above and the record as a whole, I conclude the LPN staff nurses are employees, not supervisors.

Accordingly, **IT IS ORDERED** that the Petitioner's request to clarify the bargaining unit by excluding staff nurses and medicare coordinators is denied and the petition is dismissed.[11]

Dated at Detroit, Michigan, this 26th day of May, 2005.

"/s/[Stephen M. Glasser]."

(SEAL) /s/ Stephen M. Glasser

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[11] Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the **Executive Secretary, Franklin Court, 1099 14th Street N.W., Washington D.C. 20570.** This request must be received by the Board in Washington by **June 9, 2005.**